

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Implementation of the Commercial Spectrum	)	
Enhancement Act and Modernization of the	)	WT Docket No. 05-211
Commission's Competitive Bidding Rules and	)	
Procedures	)	
	)	

To: The Commission

**PETITION FOR CLARIFICATION AND/OR RECONSIDERATION**

Pursuant to Section 1.429 of the Commission's rules,<sup>1</sup> Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP, on behalf of its small business and rural telephone clients (collectively the "Blooston Rural Carriers") hereby respectfully submits this petition for clarification and/or reconsideration of certain aspects of the Commission's *Report and Order* issued in the above captioned proceeding.<sup>2</sup> Specifically, the Blooston Rural Carriers (*see* Attachment A) request the Commission to clarify or reconsider the apparent elimination of a small business consortium's ability to stay intact and operate jointly, without suffering a loss of bid credits.

**I. INTERESTS OF THE PARTIES**

The Blooston Rural Carriers are interested parties that are significantly impacted by the outcome of this proceeding. Rural telephone cooperatives depend on bid credits to help ensure that they can provide quality, affordable and advanced telecommunications services to rural America. Accordingly, the Blooston Rural Carriers have participated extensively in rule makings

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<sup>1</sup> 47 C.F.R. § 1.429.

<sup>2</sup> Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, WT Docket No. 05-211, *Report and Order*, released January 24, 2006; 71 FR 6214 (February 7, 2006) ("*Report and Order*").

and other proceedings concerning bid credits for “designated entities” such as small businesses and rural telephone companies.<sup>3</sup> The Blooston Rural Carriers did not file comments with regard to the proposals acted upon in the Commission’s *Report and Order* in the captioned proceeding, because it was not readily apparent that these proposals contemplated the elimination of the small business consortium as an ongoing business entity, for bid credit purposes (as discussed further below).

The Blooston Rural Carriers are rural telephone companies created to provide high quality, new, efficient, and innovative telecommunications technologies to consumers of rural America. Many of these companies have participated in and won licenses in previous FCC spectrum auctions, and are contemplating participation in upcoming auctions. The experience of these carriers in serving their unique communities, and as rural licensees that garnered spectrum through participation in the Commission’s auctions, gives them particular insight into this proceeding.

## **II. INTRODUCTION**

In the *Declaratory Ruling and Notice of Proposed Rule Making* (“NPRM”) commencing this proceeding,<sup>4</sup> the Commission primarily sought to modify its auction rules to implement the Commercial Spectrum Enhancement Act (“CSEA”), which requires the Commission to facilitate the auctioning of certain bands of Federal Government spectrum to the private sector, so long as cost recovery procedures are put into place. It was almost as an afterthought that the

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<sup>3</sup> See, e.g., Petition for Reconsideration filed August 20, 2003 in WT Docket No. 97-82 (concerning the rural telephone cooperative exception under the “controlling interest” standard for revenue attribution in determining bid credits).

<sup>4</sup> Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules and Procedures, WT Docket No. 05-211, *Declaratory Ruling Notice of Proposed Rulemaking*, 20 FCC Rcd. 11,268 (2005).

Commission added (as the last paragraph of the *NPRM*) a proposal to make certain changes to the “small business consortium exception” for designated entities and entrepreneurs (embodied in Section 1.2110(b)(3)(i) of the Commission’s Rules).

Under the current small business consortium exception, when a spectrum auction bidder is a joint venture comprised exclusively of members eligible for small business bidding credits, the gross revenues of the consortium members are not aggregated. In other words, so long as each member of a consortium individually meets the financial limits for small business bidding credits, the consortium is eligible for such credits, regardless of whether the aggregated gross revenues of all consortium members would exceed the limits. The consortium exception was intended to enable small businesses or entrepreneurs to pool their resources, while preserving their bid credits, “to help them overcome capital formation problems and thereby ensure their opportunity to participate in auctions and to become strong broadband PCS competitors.”<sup>5</sup> The underlying policy objective in providing the exception for consortia “is to provide economic opportunity to those entities designated in the statute and to ensure such entities the opportunity to provide spectrum-based services.”<sup>6</sup> In proposing to clarify the rule, the FCC noted that the consortium exception has been seldom used, perhaps in part because of the lack of clear direction from the Commission as to how members of consortia that win licenses can be formally organized and how they can hold their licenses.

The *NPRM* proposed to change the small business consortium rule, by providing that each member or group of members of a winning consortium separate “mutually agreed upon licenses” would file a separate long-form application at the end of the auction, and receive its

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<sup>5</sup> See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Fifth Report and Order*, 75 RR 2d 859, 9 FCC Rcd 5532, 1994 FCC LEXIS 4971 at para. 180.

<sup>6</sup> See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348, 75 RR 2d 1, 59 FR 22980, at para. 287

separate licenses upon grant. *NPRM* at para. 54. While the *NPRM* discussed the possibility of such separate licensees to meet the Commission's small business eligibility requirements, it did not discuss what would happen if the small business consortium simply decided to stay together as a licensee, and did not make it clear that this possibility would be eliminated. The *NPRM* did not include the text of the proposed changes to Rule Sections 1.2107(g)(1)(A) and 1.2110(b)(3)(i). However, when the Commission released the text of the *Report and Order* in this proceeding, it became apparent that the Commission may have gone too far in clarifying the small business consortium rule. In particular, the *Report and Order* included new wording for these rule sections, which appears to *require* that a small business consortium divide up the licenses it wins immediately after the auction. In particular, the Commission revised Rule Section 1.2107(g)(1)(A) to state that "[a] consortium participating in competitive bidding pursuant to §1.2110(b)(3)(i) that is a winning bidder may not apply as a consortium for licenses covered by the winning bids." The Commission also adopted the following modifications to the consortium exception:

- All consortium members will be *required* to file individual long-form applications for their respective, mutually agreed-upon license(s), following an auction in which the consortium has won one or more licenses.
- In order for two or more consortium members to be licensed together for the same license(s) (or disaggregated or partitioned portions thereof), they will be required first to form a legal business entity, such as a corporation, partnership, or limited liability company.
- Any such entity will be required to comply with the applicable small business or entrepreneur financial limits. In other words, the Commission will combine their

revenues and potentially strip away the bid credit they received as part of the consortium.

However, it no longer appears possible to simply remain a joint venture, and retain the bid credits achieved thereby.

### **III. THE COMMISSION SHOULD CLARIFY ITS RULE CHANGE TO ALLOW SMALL BUSINESS CONSORTIA TO CONTINUE OPERATING WITHOUT A LOSS OF BID CREDITS**

The Blooston Rural Carriers applaud the Commission's decision to bring more clarity to the small business consortium rule, and to encourage its wider use. However, these rural carriers urge the Commission to revise the modified small business consortium rule, to clarify that a small business consortium can choose to stay together as an operational entity, without aggregation of the group's revenues and a probable loss of its bid credits. The wording of the new consortium rule makes it appear (for the first time) that the consortium cannot simply stay together as a single operating entity without having the revenues of the individual members combined. This combining of revenues is likely to place the consortium above the small business (or "very small business") revenue limits, resulting in a requirement to pay back any bid credits achieved at auction. And if the consortium tries to split up its licenses among the members but still operate jointly, it runs the risk that the FCC will nonetheless combine the group's revenues and take away bid credits, under its "identity of interest" rule for revenue attribution.<sup>7</sup> This ruling will make it difficult for small businesses to bid together as a consortium and then operate their licenses together as a single entity. Smaller bidders will thereby be forced to choose between keeping their bid credits or achieving the benefits of joint operations. Unfortunately, few wireless services are successful if they offer only an isolated

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<sup>7</sup> The identity of interest rule attributes the revenues of certain companies to each other for purposes of determining eligibility for auction bid credits. Among the criteria for determining whether an attributable "identity of interest" exists are dependence on certain contractual relationships and sharing of facilities. *See* 47 C.F.R. §§ 1.2110 (b)(2) and 1.2110 (c)(5)(i)(D).

“island” of coverage, and do not enjoy other economies of scale.

The Commission indicates in the *Report and Order* its belief that these modifications will invest the consortium exception with greater transparency, thereby promoting clearer planning by smaller entities, while continuing to allow them to enhance their competitiveness with efficiencies of scale and strategy. However, the rule change will in fact have the opposite effect: Small businesses are less likely to join forces for purposes of the auction, if they know that they must either operate alone after the auction, or give up the very bid credits earned by joining the small business consortium. In other words, efficiencies of scale and competitiveness are needed not only during the bidding process, but also in the operation of wireless systems after the auction.

Moreover, it is doubtful that two or more bidders will have an incentive to join forces even for the limited purpose of obtaining licenses, if the group must break up at the end of the auction. If a consortium is formed to bid on license A for member 1 and license B for member 2, member 1 will see all of its bidding resources go toward license B, if the consortium is unsuccessful in bidding on license A. At the end of the auction, member 2 will get a license purchased partly with member 1’s money, while member 1 will get nothing. If the consortium is allowed to stay intact, member 1 would retain an interest in the joint operation of license B.

The *Report and Order* indicates that the Commission “clarified that the consortium exception, and indeed, the consortium structure, is available only to short-form applicants seeking a size-based benefit for auction participation and not to prospective lessees, assignees, or transferees.” *Report and Order* at p. 41. However, this “clarification” was not proposed in the *NPRM*, and is contrary to prior statements and practices of the Commission in dealing with small business consortia. Indeed, the fact that the Commission’s designated entity rules permitted

eligible small business consortia to pay for licenses using installment payments [when such benefit was available] is a clear indication that the Commission contemplated that small business consortia would hold licenses and conduct operations going forward as a consortium.<sup>8</sup> It is respectfully submitted that the elimination of the small business consortium as an ongoing concern under the Commission's Rules does not serve the Commission's mandate to encourage a wide distribution of licenses, and the participation of small businesses and rural telephone companies in advanced wireless services, under Section 309(j) of the Communications Act of 1934, as amended.

It is hoped that the FCC did not intend this consequence of the revised rule. Unfortunately, because the proposed small business consortium rule change was thrown into a rulemaking focused on funding Government spectrum clearing, it did not receive adequate attention from the industry. Indeed, the *NPRM* drew only three comments, one reply comment and two *ex parte* filings.<sup>9</sup> None of these comments focused on the details of the changes to Rule Section 1.2110(b)(3)(i).<sup>10</sup> It is respectfully submitted that the *NPRM* did not provide adequate notice of the proposed rule change, since it did not provide the text of the proposed rule, and did not make clear the consequences of the rule change. The DC Circuit has observed that the notice

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<sup>8</sup> For example, in a 1999 Report and Order in PP Docket No. 92-253, the Commission said that "to encourage the participation of small businesses, including those owned by women and minorities, in the provision of MDS system offerings, the *MDS Report and Order* provided reduced upfront payments, bidding credits and installment payments to bidders that qualify as small businesses or as small business consortia." See Report and Order on Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309 (j) of the Communications Act - Competitive Bidding, MM Docket No. 94-131 and PP Docket No. 92-253, 10 FCC Rcd 9589 (1995) at para. 60 (*emphasis added*).

<sup>9</sup> In contrast, other rulemaking proceedings involving designated entity eligibility issues (*e.g.*, PP Docket No. 93-253, WT Docket No. 97-82, WT Docket 05-211) have drawn dozens of detailed comments from a wide range of commenters.

<sup>10</sup> While the *Report and Order* indicates (at footnote 10) that RTG "expressed no opposition to the possible changes to the consortium exception set forth in the *NPRM*", RTG's comments were simply and utterly silent on the subject, expressing no view of opposition or non-opposition. The only conclusion that can be drawn is that RTG did not focus on the matter.

requirement of §553(b) of the Administrative Procedure Act improves the quality of agency rulemaking by exposing regulations to diverse public comment, ensures fairness to affected parties, and provides a well-developed record that enhances the quality of judicial review. Small Refiner Lead Phase-Down Task Force v. United States EPA, 705 F.2d 506, 547 (D.C. Cir. 1983) (citations omitted)<sup>11</sup> Moreover, to the extent that the new rule appears to eliminate the previous right of small business consortia to exist and to retain small business bid credit eligibility as a consortium after license grant (*i.e.*, working a substantive change in a prior regulation), the change would constitute a “legislative rule” subject to the notice-and-comment requirements of the APA.<sup>12</sup> The public was not given adequate notice and opportunity to comment on the new Sections 1.2107(g)(1)(A) and 1.2110(b)(3)(i), since it did not *see* the text of the new rule until after it was adopted. “Agency notice must describe the range of alternatives being considered with reasonable specificity. Otherwise, interested parties will not know what to comment on, and notice will not lead to better-informed agency decisionmaking.” *Id.*, 705 F. 2d at 549. *See also* Home Box Office, Inc. v. FCC, 567 F. 2d 9, 36 (D.C. Cir. 1977)(Agency must “make its views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible”).

While the *NPRM* did discuss creating an avenue for dividing licenses among consortium members during the long form process, and requiring a new eligibility showing for certain *subsets* of consortium members that decided to combine, a reasonable person could conclude that the proposed rule changes discussed (but not shown) were designed to create options for individual members of a small business consortium, and not a *requirement* that every such consortium break up at the conclusion of the auction or face attribution. Therefore, the Blooston

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<sup>11</sup> *See, e.g. Sprint Corp. v. FCC*, 315 F.3d 369 (D.C. Cir. 2003).

<sup>12</sup> Sprint Corp., 315 F3d at 374.



Rural Carriers encourage the Commission to modify its consortium rule change, so that small and rural carriers benefit from more clear cut rules, but do not have to choose between bid credits and operational efficiencies.

#### **IV. CONCLUSION**

For the above reasons, the Blooston Rural Carriers respectfully submit that the Commission should clarify or modify its change to Rule Sections 1.2107(g)(1)(A) and 1.2110(b)(3)(i), to allow small business consortia to operate jointly without a loss of bid credits.

Respectfully submitted,

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## **The Blooston Rural Carriers**

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<b>Harrisonville Telephone Company</b>	<i>Waterloo, IL 62298</i>
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<b>Midstate Communications, Inc.</b>	<i>Kimball, SD 57355</i>
<b>OmniTel Communications</b>	<i>Nora Springs, IA 50458</i>
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